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1962
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 915

FRANK FLORES,
Petitioner,

versus

THE STATE OF TEXAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

HUME COFER
JOHN D. COFER
1408 Capital National Bank Bldg.
Austin, Texas

ATTORNEYS FOR PETITIONER

OF COUNSEL:

WM. E. DAVENPORT
Of San Angelo, Texas
DOUGLASS D. HEARNE
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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Frank Flores, prays that a writ of certiorari issue to review the judgment of The Court of Criminal Appeals of Texas, entered in the above-entitled case, on February 14, 1962.

Citations to Opinion and Action Below

The opinion of the Court below is unreported, and is printed in Appendix B hereto, infra p. 19-20. There

was no opinion by the District (Trial) Court, and there is nothing in the Trial Court's charge (R. 5-14), relating to the Federal question.

Jurisdiction

The judgment of the Court of Criminal Appeals affirming petitioner's conviction was returned January 3, 1962 (R. 126, printed in Appendix B hereto, infra p. 20-21). Rehearing was denied without written opinion February 14, 1962 (R. 130, order printed in Appendix B hereto, infra p. 21).

Petitioner promptly (February 19, 1962) filed "Appellant's Motion to Stay Issuance of Mandate" (R. 132-134, printed in Appendix B, infra p. 21-23). The Court of Criminal Appeals of Texas refused the stay of mandate (Certificate of Clerk, R. 140, material portion printed in Appendix B, infra p. 24).

Upon sworn application, mandate was stayed by Associate Justice Black, on March 9th, 1962, (R. 135-136). Material portions of the sworn application to Justice Black for stay of mandate are printed in Appendix B, infra p. 24-26.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

How Federal Question Raised

Under Supreme Court Rule 23 (1) (f), petitioner states that the Federal Question was not raised in the trial court, and was not presented to the Court

of Criminal Appeals of Texas upon the original submission, nor in the Motion for Rehearing. The question was first presented in the Motion to Stay the Mandate filed in the Court of Criminal Appeals on February 19, 1962, five days after that Court overruled the Motion for Rehearing without opinion.

Practice in Texas in criminal cases does not require assignments of error, nor need briefs be filed. The appropriate Statutes, and Rules of the Court are printed in Appendix A, infra p. 10-18.

It is the petitioner's position that the affidavit for stay of mandate in the Court of Criminal Appeals (R. 132-134, printed in Appendix B, infra p. 22-23) complied with the Texas Statutes and Rules in presenting to the Court of Criminal Appeals a prima facia showing that the prosecution against petitioner was void for lack of due process in selection of the grand jury commissioners and grand jury, because of petitioner's Mexican descent, and that the Court of Criminal Appeals should have remanded the case to the District (Trial) Court for examination and consideration of the selection of the Commissioners and grand jury in light of Hernandez v. The State of Texas, 347 U. S. 475, printed in Appendix C. infra p. 27-35.

Question Presented

1. Whether an accused of Mexican descent in the State of Texas, in Tom Green County, with a population of 70,000 of whom 14,000 are Latin-Americans, who speak, write and talk the Spanish

language, having Spanish speaking churches, clubs, schools and other group organizations consisting primarily and exclusively of the Latin-American group, is denied due process and equal protection of law, where for more than five years there has been no person of Latin-American race who was selected and served on the jury commission appointed by the District Judge of the Court in which the indictment was returned, and for five years prior to January 1st, 1962.

2. And also whether the matter was sufficiently presented to the Court of Criminal Appeals after motion for rehearing was overruled by affidavit and motion for stay.

Statutes Involved

The Constitution of the United States, and the Fourteenth Amendment thereto, are not printed.

No Federal Statute is involved.

The following Constitution, Statutes, and Court Rules of the State of Texas are involved:

Constitution of Texas, Article 5, Sec. 5, printed in Appendix A, infra p. 10-11.

Vernon's Texas Civil Statute (1948, as amended), Art. 1806, printed in Appendix A, infra p. 11.

Vernon's Texas Code of Criminal Procedure (1948, as amended):

Articles 333-350, material portion printed in Appendix A, infra p. 11-14;

Articles 813; 814; 821; 822; 823; 828; 846; and 847; printed in Appendix A, infra p. 14-16.

Rules of Court of Criminal Appeals VI and VIII, printed in Appendix A, infra p. 16-18.

Statement

The petitioner was tried in the 51st District Court of Tom Green County, Texas, for an assault with intent to murder (R. 4), and convicted (R. 16-18) and sentenced to not less than 2 and not more than 8 years in the state penitentiary (R. 33-34). Petitioner appealed (R. 30); the case was affirmed. No Federal Question appeared on the face of the Record from the trial court.

Petitioner after the motion for rehearing in the Court of Criminal Appeals of Texas, filed in that Court a motion to stay the mandate showing that he is a member of the Latin-American race, and that he desired to appeal his case to the Federal Courts by asking the Supreme Court for a Writ of Certiorari; that for more than five years that there has been no person of Latin-American race who was selected and served on the jury commission appointed by the District Judge of the 51st District Court of Tom Green County, Texas, and of those selected and who served on said jury commission no person was selected to serve on the Grand Jury for five years prior to January 1st, 1962 who was a

member of the Latin-American race. (R. 134; printed in Appendix B, infra p. 21-23).

The Court refused to consider such motion, and to stay the mandate, until same was stayed upon application to Associate Justice Black of this Court (R. 140; printed in Appendix B, infra p. 24).

The Court of Criminal Appeals has affirmed the petitioner's conviction (Certificate of Clerk, R. 140, printed in Appendix B, infra p. 24).

Petitioner is of the opinion that the motion for stay and affidavit presents to the Court of Criminal Appeals and to this Court the point that he was denied due process and equal protection of law.

Reasons for Granting the Writ

Petitioner's substantive right to have the propriety of the returning of an indictment against him by a grand jury selected by the jury commissioners who have been appointed and selected, and from which members of his race have been systematically excluded is established by Hernandez v. The State of Texas, 347 U. S. 475, printed in Appendix C, infra p. 27-35.

The Court of Criminal Appeals of Texas, both under the Constitution of Texas and Statute has power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. See: Constitution of Texas

(Vernon's Annotated), Art. 5, Sec. 5, and Vernon's Civil Statutes (1948), Art. 1806; constitutional provision and the statute printed in Appendix A, p. 10-11.

If it be shown by affidavit that the indictment is void, then the Court of Criminal Appeals may ascertain this fact by remand to the District Court for determination.

There is nothing in the Statutes of Texas, or the Rules of the Court of Criminal Appeals of Texas, which requires the Court to ignore petitioner's constitutional rights to a fair trial because not raised in any particular way. If it is made to appear by affidavit before final disposition of petitioner's case, that petitioner's constitutional rights were denied, the Texas Court of Criminal Appeals had ample power to protect these rights by remand to the trial court for consideration of such matters upon a hearing. See statutes printed in Appendix A.

Particularly the validity of the grand jury indicting the petitioner is not one of the presumptions which the Court of Criminal Appeals is entitled to indulge against petitioner under Article 847, printed infra p. 16.

Under this statute there is ample power in the appellate court to ascertain the facts with reference to the invalidity of the jury commission.

Serious constitutional rights insuring a fair trial are not to be, and should not be, circumvented by procedural considerations, particularly where, as in

Texas, no statutory impediments to action by the appellate court exist.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HUME COFER

JOHN D. COFER
1408 Capital National Bank Bldg.
Austin, Texas

ATTORNEYS FOR PETITIONER

27 May 1962

OF COUNSEL:
WM. E. DAVENPORT
Of San Angelo, Texas
DOUGLASS D. HEARNE
Of Austin, Texas

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Petition for Writ of Certiorari has been served upon Respondent by depositing the same in a United States post office, with first class air mail postage prepaid, addressed to the counsel of record for Respondent, namely Hon. Leon Douglas, State Attorney for the Court of Criminal Appeals.

John D. Cofer
Counsel for Petitioners

ENTRY OF APPEARANCE

The undersigned, Hume Cofer, and John D. Cofer, 1408 Capital National Bank Building, Austin 16, Texas, both members of the Bar of the Supreme Court of the United States, hereby enter their appearance in the captioned cause on behalf of Petitioners. Douglass D. Hearne, 1408 Capital National Bank Building, Austin 16, Texas, and William E. Davenport of San Angelo, Texas, are of counsel.

Hume Cofer

John D. Cofer
Counsel for Petitioners

APPENDIX A

CONSTITUTION OF TEXAS (VERNON'S ANN.), ART. 5, SEC. 5:

"ART. 5:

"SEC. 5. JURISDICTION OF COURT OF CRIMINAL APPEALS; TERMS OF COURT; CLERK

"Sec. 5. The Court of Criminal Appeals shall have appellate jurisdiction co-extensive with the limits of the State in all criminal cases of whatever grade, with such exceptions and under such regulations as may be prescribed by law.

"The Court of Criminal Appeals and the Judges thereof shall have the power to issue the writ of habeas corpus, and under such regulations as may be prescribed by law, issue such writs as may be necessary to enforce its own jurisdiction. The Court of Criminal Appeals shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction. The Court of Criminal Appeals shall sit for the transaction of business from the first Monday in October to the last Saturday of June in each year, at the State capital and two other places (or the capital city) if the Legislature shall hereafter so provide. The Court of Criminal Appeals shall appoint a clerk for each place at which it may sit and each clerk shall give bond in such manner as is now or may hereafter be required by law, and who shall

hold his office for four years unless sooner removed by the court for good cause entered of record on the minutes of said court. As amended Aug. 11, 1891; proclamation Sept. 22, 1891."

VERNON'S TEXAS CIV. STATS. (1948):

"ART. 1806. 1661, 1054. MAY ASCERTAIN FACTS

"Said court shall have power upon affidavit or otherwise to ascertain such matters of fact as may be necessary to the exercise of its jurisdiction."

VERNON'S TEX. CODE OF CRIM. PROC. (1948, AS AMENDED):

"ARTICLE 333, (384) (372) APPOINTMENT OF JURY COMMISSIONERS

"The District Judge, at or during any term of court, shall appoint not less than three (3), nor more than five (5) persons to perform the duties of jury commissioners, and shall cause the sheriff to notify them of their appointment, and when and where they are to appear. The District Judge shall, in the order appointing such commissioners, designate whether such commissioners shall serve during the term at which selected or for the next succeeding term. Such commissioners shall receive as compensation for each day or part thereof they may serve the sum of Four ($4.00) Dollars, and they shall possess the following qualifications:

"1. Be intelligent citizens of the county and able to read and write the English language;

"2. Be qualified jurors and freeholders in the county;

"3. Have no suit in said court which requires intervention of a jury;

"4. Be residents of different portions of the county:

"5. The same person shall not act as jury commissioner more than once in the same year. Acts 1876, p. 79; Acts 1943, 48th Leg., p. 468, ch. 312, Sec. 1; Acts 1947, 50th Leg., p. 141, ch. 83, Sec. 2; Acts 1951, 52nd Leg., p. 816, ch. 461, Sec. 1."

"ARTICLE 338. (389) (377) SHALL SELECT GRAND JURORS

"The jury commissioners shall select sixteen men from the citizens of different portions of the county to be summoned as grand jurors for the next term of court, or the term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners. Acts 876, p. 79; Acts 1951, 52nd Leg., p. 815, ch. 460, Sec. 1."

"ARTICLE 339 (390) (378) QUALIFICATIONS

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony. Acts 1876, p. 78; O.C. 289; Const., art. 16, sec. 19; Acts 1903, 1st C.S., p. 16."

"ARTICLE 348. (399) (387) FAILURE TO SELECT

"If for any reason a grand jury shall not be selected or summoned prior to the commencement of any term of court, or when none of those summoned shall attend, the District Judge may at any time after the commencement of the term, in his discretion, direct a writ to be issued to the sheriff commanding him to summon a jury commission, selected by the court, which commission shall select

sixteen (16) persons, as provided by law, who shall serve as grand jurors. O.C. 347; Acts 1933, 43rd Leg., p. 56, ch. 27; Acts 1951, 52nd Leg., p. 815, ch. 460, Sec. 1."

"ARTICLE 813. 894. 872. DEFENDANT MAY APPEAL

"A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed."

"ARTICLE 814. 898, 875 PRESENCE IN APPELLATE COURT

"The defendant need not be personally present upon the hearing of his cause in the Court of Criminal Appeals, but if not in jail he may appear in person. Acts 1892, p. 38."

"ARTICLE 821. 908 RIGHT OF APPEAL NOT ABRIDGED

"The right of appeal, as otherwise provided by law, shall in no wise be abridged by any provision of this chapter. Id."

"ARTICLE 822. 910. 878. APPEAL PROSECUTED IMMEDIATELY

"An appeal may be prosecuted immediately to the Court of Criminal Appeals, and the clerk shall without delay make out and forward the record to the Court of Criminal Appeals."

"ARTICLE 823. 911. 879. WHEN TRANSCRIPT MAY BE FILED

"The transcript may be filed in the Court of Criminal Appeals, and the case tried in said court while the court in which the conviction was had is yet in session. Upon an affirmance of the judgment by the appellate court, sentence may be pronounced by the trial court at the same term at which the conviction was had. Acts 1st C.S. 1891, p. 38."

"ARTICLE 828. 916. 884. EFFECT OF APPEAL

"The effect of an appeal is to suspend and arrest all further proceedings in the case in the court in which the conviction was had, until the judgment of the appellate court is received by the court from which the appeal was taken. In cases where, after notice of appeal has been given, the record or any portion thereof, is lost or destroyed, it may be substituted in the lower court, if said court be then in session; and, when so substituted, the transcript may be prepared and sent up as in other cases. In case the court from which the appeal was taken be not then in session, the appellate court shall postpone the consideration of such appeal until the next term of said court from which said appeal was taken; and the said record shall be substituted at said term as in other cases. O.C. 727."

"ARTICLE 846. 937. 903. APPEALS, WHEN DETERMINED

"The Court of Criminal Appeals shall hear and determine appeals in criminal actions at the earliest time it may be done, with due regard to the rights of parties and proper administration of justice. Id."

"ARTICLE 847. 938. 904. PRESUMPTIONS ON APPEAL

"The Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment, as the law and nature of the case may require. The court shall presume that the venue was proven in the court below; that the jury was properly impaneled and sworn; that the defendants was arraigned; that he pleaded to the indictment; that the court's charge was certified by the judge and filed by the clerk before it was read to the jury, unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by a bill of exceptions approved by the judge of the court below, or proven up by by-standers, as provided by law, and duly incorporated in the transcript. In each case by it decided, the Court of Criminal Appeals shall deliver a written opinion, setting forth the reasons for such decision. Acts 1897, p. 11."

RULES OF THE COURT OF CRIMINAL APPEALS, ADOPTED AND RE-ADOPTED MARCH 20, 1958. NO AMENDMENTS TO DATE (Vernon's Tex. Code of Cr. Pr., Vol 3, pocket parts 1961, p. 127-128).

"VI. Any party desiring a rehearing of any matter determined by the Court of Criminal Appeals may, within fifteen days after the opinion is handed down, file with the Clerk of said Court his motion in writing for a rehearing thereof, distinctly specifying the grounds relied upon for the rehearing.

"If the Court hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may be filed by the losing party within fifteen days after such opinion is handed down; but a further motion for rehearing shall not be made as a matter of right in any other case.

"Any motion for rehearing may be amended any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the Court any time before its final dispostion.

"All motions and other matters filed in the Court of Criminal Appeals and not disposed of at the end of the term shall be automatically continued to the next succeeding term of said Court."

"VIII. Cases filed without bills of exception or statement of facts are submitted as soon as possible after being filed. Where the proceedings are found regular and no question of law is raised in such cases, they will be disposed of by per curiam opinion not citing authorities. Such per curiam opinions shall not be published, and the Clerk of the Court shall not certify any such opinions for publication.

"Should such an opinion be cited in any future case before the Court, it shall not be deemed an authority."

APPENDIX B.

1. OPINION OF THE COURT OF CRIMINAL APPEALS (R. 123).

"The offense is assualt to murder; the punishment, 8 years.

"The injured party Garza testified that, while he was standing at the bar in the Copa Cabana on the night in question engaged in conversation with another patron, appellant, who was seated at one of the tables, without any warning or provocation, shot him with a pistol. He was carried to the hospital where he was treated for a few days. Trini Lopez, the owner of the bar, testified that he heard a loud noise, saw Garza fall with a "lot of blood on him," and then saw his bouncer, Mata, and another man disarm appellant at the table. Mata testified that he heard a noise and then saw appellant with a pistol in his hand, that he disarmed appellant and later the man who assisted him turned the pistol over to Officer Williams. Williams indentified the .25 caliber pistol introduced in evidence as being the one turned over to him by Mata and another.

"Appellant, testifying in his own behalf, stated that he shot Garza because he had a knife in his hand "and I though he was going to cut me" and because he believed his life and that of his brother were in danger. He testified about prior troubles with some of Garza's kinsmen. Appellant's brother and another witness corroborated his testimony, but

no witness testified to any overt act on the part of Garza.

"In rebuttal, the State called witnesses who testified that appellant's reputation for being a peaceable and law abiding citizen was bad.

"The careful trial judge submitted the issue of self-defense and defense of another; the jury resolved what conflict there was in the evidence against appellant, and we find it sufficient to support the conviction.

"In his brief and in argument, appellant complains of the overruling of his motion for new trial which alleged that the prosecutor committed error during the course of his argument and that new evidence had been discovered. We find no statement of facts on the hearing on the motion and no formal bills of exception, and the argument is not preserved by informal bills of exception. An exhibit attached to the motion for new trial does not prove itself and cannot be substituted for a bill of exception.

"Nothing is presented for review. Young v. State, 243 S.W. 2d 587; Bridges v. State, 316 S.W. 2d 757; and Spigner v. State, 335 S.W. 2d 605.

"Finding no reversible error, the judgment of the trial court is affirmed. (Delivered January 3, 1962.)"

2. JUDGMENT AFFIRMING (R. 126).

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

3. ORDER OVERRULING MOTION FOR REHEARING (R. 130).

"This cause came to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled."

4. MOTION TO STAY ISSUANCE OF MANDATE (TOGETHER WITH AFFIDAVIT ATTACHED) (R. 132-134).

"Now comes appellant herein, who is a member of the Latin-American race and language group and for the relief prayed for would show the Court:

"That he desires to appeal his case to Federal Courts by asking the Supreme Court of the United States for a Writ of Certiorari. That the grounds, among others, for asking this writ are: That for more than five years that there has been no person of Latin-American race who was selected and served on the Jury Commission appointed by the District Judge of the 51st District Court of Tom Green Coun-

ty, Texas, and of those selected and who served on said Grand Jury Commission no-person was selected to serve on the Grand Jury for five years prior to January 1st, 1962, who was a member of the Latin-American race. That Tom Green County, Texas, has a population of approximately 70,000 persons of whom 14,000 are Latin-American, who speak, write and talk the Spanish language, have Spanish speaking churches, clubs, schools and other group organizations consisting primarily and exclusively of the Latin-American group.

"That the failure of the District Court to recognise this large minority group in the appointment of Grand Jury Commissioners and of Grand jurors constitutes a lack of due process and is a violation of State and Federal Constitutions and Statutes and same makes the conviction of Appellant under an indictment instituted by Grand Jury so obtained void and voidable.

"Wherefore, Appellant prays that this Court issue an order staying the issuance of Mandate in this cause for a period of sixty days or as long as possible in order to allow Appellant time to obtain exhibits and perfect the record in his application for Writ of Certiorari to the Supreme Court of the United States."

"AFFIDAVIT

"Before me, the undersigned authority, this day personally appeared Frank Flores, Appellant in the above styled case, and after being duly sworn de-

poses and says: "My name in Frank Flores, I live in San Angelo, Texas, and have been informed, believe and now allege that for more than five years that there has been no person of Latin-American race who was selected and served on the jury commission appointed by the District Judge of the 51st District Court of Tom Green County, Texas, and of those selected and who served on said Grand Jury Commission no person was selected to serve on the Grand Jury for five years prior to January 1st, 1962, who was a member of the Latin-American race. That Tom Green County, Texas, has a population of approximately 70,000 persons of whom 14,000 are Latin-American who speak, write and talk the Spanish Language, have Spanish speaking churches, clubs, school and other group organizations consisting primarily and exclusively of the Latin-American group."

"Witness my hand this 17th day of February, 1962.

"/s/ Frank Flores

"Frank Flores

"Subscribed and sworn to before me this 17th day of February, 1962.

"/s/ N. M. Davenport

"N. M. Davenport, Notary Public, Tom Green County, Texas."

5. CERTIFICATE OF CLERK (MATERIAL PORTION) (R. 140).

"THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on February 14, 1962, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas in criminal cases, and said judgment has now become final on the docket of this court. Mandate would have issued had it not been stayed on Order of the Supreme Court of the United States.

"WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 18th day of April, A.D. 1962."

6. FROM MOTION FOR STAY TO ASSOCIATE JUSTICE BLACK (See motion in Supreme Court)

"Applicant, Frank Flores, has been convicted from the 51st Judicial District Court of Tom Green County, Texas, for the offense of assault with intent to murder and has been sentenced to serve eight (8) years in the State Penitentiary of Texas. Applicant has duly appealed under the laws of the State of Texas to the Court of Criminal Appeals of Texas, seeking a review and reversal of his case. Said case has been affirmed by said appellate court, and applicant has duly filed his Motion for Rehearing in said Court, which Motion for Rehearing was overruled on the 21st day of February, 1962, at

which time said cause became final in the State Courts of Texas.

"Immediately thereafter, this applicant desiring to review his case and urge a federal question, made a motion to the Court of Criminal Appeals of the State of Texas, duly sworn to, setting forth the federal question which rendered his indictment and trial null and void and setting forth in said motion for stay that he was indicted by a Grand Jury in the 51st Judicial District Court of Tom Green County, Texas, and that he is an American citizen of Mexican descent; that there is a population of approximately 70,000 persons in Tom Green County, Texas, and that of this number 14,000 are Latin-American, who speak, write and talk the Spanish language, have Spanish speaking churches, clubs, schools and other group organizations consisting primarily and exclusively of the Latin-American group; that for a long period of time no person of Latin-American race has been selected and has served on the jury commission appointed by the District Judge of the 51st District Court of Tom Green County, Texas, or upon the Grand (Jury) out of said Court. The applicant has demonstrated in his sworn Motion for Stay, a copy of which is attached hereto, that said facts fundamentally present a federal question of due process and equal protection under the Constitution of the United States and the amendments thereto, and that he is entitled to present this petition to the United States Supreme Court. And in particular, if the present record is insufficient to show such federal question, that it is

necessary for him to pursue his remedies in the State case by petition for certiorari to the Supreme Court of the United States, as held in *Darr v. Burford, 339 U.S. 200.*

"Applicant shows that under the case of *Hernandez v. The State of Texas, 347 U.S. 475,* decided at the October, 1953 Term, if the facts are true, that he is entitled to have his case reversed and the prosecution and the indictment against him to be held null and void."

APPENDIX C

HERNANDEZ

v.

THE STATE OF TEXAS,

347 U. S. 475

(May 3, 1954)

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The petitioner, Pete Hernandez, was indicted for the murder of one Joe Espinosa by a grand jury in Jackson County, Texas. He was convicted and sentenced to life imprisonment. The Texas Court of Criminal Appeals affirmed the judgment of the trial court. Tex. Crim. Re. , 251 S.W. 2d 531. Prior to the trial, the petitioner, by his counsel, offered timely motions to quash the indictment and the jury panel. He alleged that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit

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[1] Texas law provides that at each term of court, the judge shall appoint three to five jury commisisoners. The judge instructs these commissioners as to their duties. After taking an oath that they will not knowingly select a grand juror they believe unfit or unqualified, the commissioners retire to a room in the courthouse where they select from the county assessment roll the names of 16 jurors from different parts of the county. These names are placed in a sealed envelope and delivered to the clerk. Thirty days before court meets, the clerk delivers a copy

jurors, although there were such persons fully qualified to serve residing in Jackson County.

The petitioner asserted that exclusion of this class deprived him, as a member of the class, of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. After a hearing, the trial court denied the motions. At the trial, the motions were renewed, further evidence taken, and the motions again denied. An allegation that the trial court erred in denying the motions was the sole basis of petitioner's appeal. In affirming the judgment of the trial court, the Texas Court of Criminal Appeals considered and passed upon the substantial federal question raised by the petitioner. We granted a writ of certiorari to review that decision. 346 U. S. 811.

In numerous decisions, this Court has held that it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury, or before a petit jury, from which all persons of his race or color have, solely because of that race or color, been excluded by the State, whether acting through its legislature, its courts, or its executive or administrative officers.* Although the Court has had little oc-

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of the list to the sheriff who summons the jurors. Vernon's Tex. Code Crim. Proc., 1948, Arts. 333-350.

The general jury panel is also selected by the jury commission. Vernon's Tex. Civ. Stat., 1948, Art. 2107. In capital cases, a special venire may be selected from the list furnished by the commissioners. Vernon's Tex. Code Crim. Proc. 1948, Art. 592.

*See *Carter v. Texas*, 177 U. S. 442, 447.

casion to rule on the question directly, it has been recognized since *Strauder v. West Virginia*, 100 U. S. 303, that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws.[5] The State of Texas would have us hold that there are only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support that view.[6] And, except where the question presented involves the exclusion of persons of Mexican descent from juries,[7] Texas courts have taken a broader view of the scope of the equal protection clause.[8]

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[5] "Nor if a law should be passed excluding all naturalized Celtic Irishmen (from jury service), would there be any doubt of its inconsistency with the spirit of the amendment," 100 U.S., at 308. Cf. *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92.

[6] See *Truax v. Raich*, 239 U.S. 33; *Takahashi v. Fish & Game Commission*, 334 U. S. 410. Cf. *Hirabayashi v. United States*, 320 U. S. 81, 100: "Distinction between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

[7] *Sanchez v. State*, 147 Tex. Crim. Rep. 436, 181 S. W. 2d 81; *Salazar v. State*, 149 Tex. Crim. Rep. 260, 193 S. W. 2d 211; *Sanchez v. State*, 156 Tex. Crim. Rep. 468, 243 S. W. 2d 700.

[8] In *Juarez v. State*, 102 Tex. Crim. Rep. 297, 277 S. W. 1091, the Texas court held that the systematic exclusion of Roman Catholics from juries was barred by the Fourteenth Amendment. In *Clifton v. Puente*, 218 S. W. 2d 272, the Texas court ruled that restrictive covenants prohibiting the sale of land to persons of Mexican descent were unenforceable.

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon difference between "white" and Negro.

As the petitioner asknowledges, the Texas system of selecting grand and petit jurors by the use of jury commission is fair on its face and capable of being utilized without discrimination. But as this Court has held, the system is susceptible to abuse and can be employed in a discriminatory manner. The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment. The Texas statute makes no such dis-

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Smith v. Texas, 311 U. S. 128, 130.

Smith v. Texas, supra, note 7; *Hill v. Texas*, 316 U. S. 400; *Cassell v. Texas*, 339 U. S. 282; *Ross v. Texas*, 341 U. S. 918.

crimination, but the petitioner alleges that those administering the law do.

The petitioner's initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from "whites." One method by which this may de demonstrated is by showing the attitude of the community. Here the testimony of responsible officials and citizens contained the admission that residents of the community distinguished between "white" and "Mexican." The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades.[1] At least one restaurant in town prominently displayed a sign announcing "No Mexicans Served." On the courthouse grounds at the time of the hearing, there were two men's toilets, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here"). No substantial evidence was offered to rebut the logical

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[1] We do not have before us the question whether or not the Court might take judicial notice that persons of Mexican descent are there considered as a separate class. See Marden, Minorities in American Society; McDonagh & Richards, Ethnic Relations in the United States.

[2] The reason given by the school superintendent for this segregation was that these children needed special help in learning English. In this special school, each teacher taught two grades, while in the regular school each taught only one in most instances. Most of the children of Mexican descent left school by the fifth or sixth grade.

inference to be drawn from these facts, and it must be concluded that petitioner succeeded in his proof.

Having established the existence of a class, petitioner was then charged with the burden of proving discrimination. To do so, he relied on the pattern of proof established by *Norris v. Alabama*, 294 U. S. 587. In that case, proof that Negroes constituted a substantial segment of the population of the jurisdiction, that some Negroes were qualified to serve as jurors, and that none had been called for jury service over an extended period of time, was held to constitute prima facie proof of the systematic exclusion of Negroes from jury service. This holding, sometimes called the "rule of exclusion," has been applied in other cases,[11] and it is available in supplying proof of discrimination against any delineated class.

The petitioner established that 14% of the population of Jackson County were persons with Mexican or Latin American surnames, and that 11% of the males over 21 bore such names.[12] The County Tax

[11] See note 8, *supra*.

[12] The 1950 census report shows that of the 12,916 residents of Jackson County, 1,865, or about 14% had Mexican or Latin American surnames. U. S. Census of Population, 1950, Vol. II, pt. 43, p. 180; *id.*, Vol. IV, pt. 3, ch. C, p. 45. Of these, 1,865, 1,738 were native born American citizens and 65 were naturalized citizens. *Id.*, Vol. IV, pt. 3, ch. C, p. 45. Of the 3,754 males over 21 years of age in the County, 408, or about 11% had Spanish surnames. *Id.*, Vol. II, pt. 43, p. 180; *id.*, Vol. IV, pt. 3, ch. C, p. 67. The State challenges any reliance on names as showing the descent of persons in the County. However, just as persons of a different race are distinguished by color, these Spanish names provide ready indentification of the members of this class. In selecting jurors, the jury commisisoners work from a list of names.

Assessor testified that 6 or 7 per cent of the freeholders on the tax rolls of the County were persons of Mexican descent. The State of Texas stipulated that "for the last twenty-five years there is no record of any person with a Mexican or Latin American name having served on a jury commission, grand jury or petit jury in Jackson County." [13] The parties also stipulated that "there are some male persons of Mexican or Latin American descent in Jackson County who, by virtue of being citizens, freeholders, and having all other legal prerequisites of jury service, are eligible to serve as members of a jury commission, grand jury and/or petit jury." [14]

The petitioner met the burden of proof imposed in *Norris v. Alabama, supra.* To rebut the strong prima facie case of the denial of the equal protection of the laws guaranteed by the Constitution thus established, the State offered the testimony of five jury commissioners that they had not discriminated against persons of Mexican or Latin American descent in selecting jurors. They stated that their only objective had been to select those whom they thought were best qualified. This testimony is not enough to overcome the petitioner's case. As the Court said in *Norris v. Alabama*:

> "That showing as to the long-continued exclusion of negroes from jury service, and as to

[13] R. 34.

[14] R. 55. The parties also stipulated that there were no persons of Mexican or Latin American descent on the list of talesmen. R. 83. Each item of each stipulation was amply supported by the testimony adduced at the hearing.

> the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement."[15]

The same reasoning is applicable to these facts.

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not is was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.

To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury[16] ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced.[17] His only claim is the right

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[15] 294 U. S., at 598.

[16] See *Akins v. Texas*, 325 U.S. 398, 403; *Cassell v. Texas*, 339 U.S. 282, 286-287.

[17] See *Akins v. Texas*, *supra*, note 16, at 403.

to be indicted and tried by juries from which all members of his class are not systematically excluded —juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

Reversed.